

**Elmer R. Baumgardner t/a Baumgardner Company
and International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of
America, AFL-CIO.** Cases 6-CA-19251 and 6-
CA-19564

August 27, 1991

**SECOND SUPPLEMENTAL DECISION
AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On June 17, 1991, Administrative Law Judge George F. McNerny issued the attached supplemental decision. The Respondent filed exceptions and the General Counsel filed a motion for the Board to disregard the Respondent's exceptions¹ and, in the alternative, an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Elmer R. Baumgardner t/a Baumgardner Company, Fayetteville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The General Counsel contends that the Respondent's exceptions do not comply with Sec. 102.46(b)(1) and (2) of the Board's Rules and Regulations. After a careful examination of the Respondent's exceptions, we deny the General Counsel's motion to disregard on the ground that the exceptions substantially comply with the Board's Rules.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that for the final 4 weeks of the backpay period, the compliance specification used hours worked by employee Stanhope as a basis for projecting the number of hours that Welsh would have worked. We find that the specification's reliance on Stanhope, who then was the only remaining employee whose responsibilities were similar to those of Welsh, was appropriate.

Patricia J. Scott, Esq., for the General Counsel.
Jan G. Sulcove, Esq. (Black and Davison), of Chambersburg, Pennsylvania, for the Respondent.
Philip W. Crawford Sr., of Waynesboro, Pennsylvania, for the Charging Party.

SUPPLEMENTAL DECISION

I. BACKGROUND

On May 12, 1988, the National Labor Relations Board (the Board), issued a Decision and Order in the above-numbered cases (288 NLRB 977 (1988)) in which the Board ordered the Respondent, Elmer R. Baumgardner, t/a Baumgardner Company (Baumgardner), or (the Respondent), to make whole Marvin Welsh Jr. for any loss of pay he may have suffered as a result of the Respondent's discrimination against him.¹

On May 5, 1989, a controversy having arisen over the amount of backpay due under the Board's Decision and Order, the Regional Director for Region 6 issued a backpay specification and notice of hearing. The Respondent filed an answer to the backpay specification on May 26, 1989. The Acting General Counsel of the Board, acting through the Regional Office for Region 6 filed a motion with the Board on August 15, 1989, to strike the answer, or, in the alternative, for summary judgment based on certain procedural grounds.

The Board considered this motion, and subsequent pleadings, and on March 30, 1990, issued a Supplemental Decision and Order remanding the matter denying the General Counsel's motion to strike and granting the Motion for Summary Judgment, in part.² The Board ordered that the Regional Director for Region 6 issue a notice of hearing before an administrative law judge which was to be limited to taking evidence concerning pay increases alleged to be due Marvin Welsh Jr. during the backpay period, and concerning Welsh's interim earnings. After several postponements, a hearing was held before me at Chambersburg, Pennsylvania, on December 13, 1990. After the close of the hearing, briefs were filed by the Respondent and the General Counsel, which have been carefully considered.

II. THE ISSUES

A. Interim Earnings

In its answer to the backpay specification on May 26, 1989, the Respondent demanded proof of the allegation in the specification concerning interim earnings. However, during the hearing, Respondent did not call Marvin Welsh, who was present throughout, as a witness, and, in its brief adopted the amounts of interim earnings presented in the specification, up to December 31, 1988.

Accordingly, I find that the total amounts of net interim earnings for the whole backpay period are true and accurate. *Colorado Forge Corp.*, 285 NLRB 530 (1989).

B. Pay Increases During the Backpay Period

John O'Connell, compliance supervisor for the Board's Regional Office for Region 6, and the author of the backpay specification here as issue, testified that he determined the amounts and frequency of wage increases which would have been earned by Marvin Welsh Jr. but for the discrimination against him by Respondent. O'Connell stated that he used the actual experience on the Respondent's property of an-

¹The Board's Decision was enforced by the United States Court of Appeals for the Third Circuit in an unpublished memorandum opinion dated December 28, 1988.

²289 NLRB 22 (1990).

other employee named Kenneth Crouse to project the earnings that Welsh would have received during the backpay period. Crouse was the closest employee to Welsh in his date of employment, and performed the same work as Welsh performed for Respondent. During the backpay period, after Welsh was discharged, Crouse received four increases, on December 15, 1986, February 2, 1987, April 6, 1987, and November 30, 1987.

Elmer Baumgardner testified that Welsh was employed to weld on a steel tank to be used as part of a water treatment plant. Welsh could not, and actually refused, to do welding on some aluminum tanks used to haul materials to the Respondent's plant. According to Baumgardner, Welsh, as well as two other welders, Arthur Frye and Leonard Baker, "had no skill at using the type of equipment and welding the aluminum that was required." Kenneth Crouse, and another employee named William Jones, could and did do the aluminum welding.

Baumgardner also testified that he observed all of the welders on a day-to-day basis, and that, on the basis of "qualifications" he would equate Welsh not with Crouse, but with William Jones. He stated that Jones and Welsh "were of the general same productivity—the quality of their work was equal and they performed very similar tasks. Overall they had generally the same qualifications."³

I found Baumgardner's entire testimony to be uncorroborated, unsupported by any documentation or the re-

³Not mentioning, as he had previously, that Jones could and did weld the aluminum tanks.

sults of any work performance evaluations,⁴ merely anecdotal, conclusionary and totally self-serving, falling far short of meeting the Respondent's burden of showing that Welsh would have been treated differently than was Kenneth Crouse, no matter how highly Crouse's services allegedly became, after Welsh's discharge, to be valued by Baumgardner. *Midwest Hanger Co.*, 221 NLRB 911 (1975); See also *Boland Marine & Mfg. Co.*, 280 NLRB 454 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Elmer Baumgardner, t/a Baumgardner Company, Fayetteville, Pennsylvania, its officers, agents, successors, and assigns, shall satisfy his obligation to make Marvin Welsh Jr. whole by payment to him of the amount of \$11,527.85, less appropriate deductions for Federal and other income taxes, and social security, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁴Welsh had received two wage increases before his discharge, with no mention about inability or refusal to perform all assigned duties.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.